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COURT OF CRIMINAL APPEALS
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In the

# Court of Criminal Appeals of Texas

Austin, Texas

STATE OF TEXAS,
*Appellant*

*v.*

MARTIN RIVERA LOPEZ,
*Appellee*

On the State's petition for discretionary review from the Fourth Court of Appeals, San Antonio, Texas

Appellate Cause No. 04-17-00568-CR

Appealed from a dismissal order in the County Court at Law No. 7 Bexar County, Texas

Trial Cause No. 549327

## STATE'S BRIEF ON THE MERITS

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County Court at Law No. 7

**Panel of the Fourth Court of Appeals:** THE HONORABLE SANDEE BRYAN MARION, *Chief Justice*
THE HONORABLE REBECA MARTINEZ, *Justice*
THE HONORABLE LUZ ELENA CHAPA, *Justice*
Author of the Opinion

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## STATEMENT OF THE CASE

The State charged Martin Lopez with intentionally or knowingly causing offensive or provocative physical contact to Maria Lopez, an elderly person (C.R. at 6). *See* TEX. PENAL CODE §§ 22.01(a)(3) & 22.01(c)(1). The trial court signed an order granting Lopez's request for a dismissal based on a violation of his right to a speedy trial (C.R. at 12). The court of appeals affirmed that order in a published decision. *State v. Lopez*, 563 S.W.3d 409 (Tex. App.—San Antonio 2018, pet. granted). The State moved for rehearing and en banc consideration. The panel denied rehearing but issued a new opinion on October 24, 2018 (Appendix A). Because the panel issued a new opinion, the en banc court denied the motion for en banc consideration as moot on the same day (Appendix B). This Court subsequently granted the State's petition for discretionary review.

## GROUNDS FOR REVIEW

**Ground One:** The court of appeals erred by concluding that a 112 day delay was presumptively prejudicial based on potential delay that had not yet occurred and by weighing the first *Barker* factor against the State.

**Ground Two:** The court of appeals erred by concluding that the State was responsible for the delay and by weighing the second *Barker* factor against the State.

**Ground Three:** The court of appeals erred by weighing the third *Barker* factor against the State without any evidence that Lopez asserted his right to a speedy trial.

## STATEMENT OF FACTS

Lopez is alleged to have assaulted his mother Marie Lopez on April 18, 2017 (C.R. at 6). He was initially arrested and held pursuant to a felony complaint for causing bodily injury to an elderly person. *See* TEX. PENAL CODE § 22.04(a). The State and Lopez agree that the felony complaint was dropped; however, there is a disagreement as to why. Lopez's attorney believes that it was dropped due to a lack of evidence of bodily injury while the State maintained that the misdemeanor charge was "more appropriate" despite there being evidence of bodily injury (I R.R. at 11). The parties agree that Lopez was confined in the Bexar County jail from the night of his arrest until the hearing on his speedy trial motion—approximately three months and 21 days (April 18 through August 8, 2017).

When the felony complaint was dismissed, the State charged Lopez by information with assault by causing offensive or provocative physical contact to an elderly person (C.R. at 6). *See* TEX. PENAL CODE §§ 22.01(a)(3) & 22.01(c)(1). Based on the trial court's docket sheet and the reporter's record, it appears that between July 20 and 24, 2017, Lopez unsuccessfully applied for a personal recognizance bond (C.R. at 4; I R.R. at 14). According to the trial court, the pretrial services officer attempted to make an arrangement for Lopez to stay at Haven for Hope, but he was rejected due to a prior suicide watch (I R.R. at 7).

The first and only trial setting for this case was August 8, 2017—less than four months after the alleged assault (C.R. at 4). This setting began with the trial court inquiring as to whether Lopez was competent enough to voluntarily and intelligently enter into a plea bargain that would result in him being placed on deferred adjudication community supervision (I R.R. at 5).

During the hearing all the participants—with the exception of Lopez himself—expressed some concern about his competency to stand trial (I R.R. at 7, 8). Early in the hearing the trial court went off the record for an unspecified period (I R.R. at 6). At the conclusion of this recess, Lopez's attorney asked for the case to be dismissed for lack of a speedy trial and that the appropriate motion would be filed with the court "as quickly as possible" (I R.R. at 6). The prosecutor objected that he had not received any prior notice of the speedy trial motion (I R.R. at 7).

After hearing argument by the parties, the trial court granted the speedy trial motion by telling Lopez that he could go to trial "right now" (I R.R. at 8). Then the trial court abruptly ordered the case dismissed (I R.R. at 8).

After another brief recess, Lopez's attorney asserted that Lopez was arrested on April 17, 2017 on suspicion of felony assault on an elderly person. According to counsel, the prosecution moved to dismiss the felony complaint on July 12, 2017 and immediately charged him with misdemeanor assault on an elderly person (I

R.R. at 10). Counsel also stated that he and the prosecution both had concerns about Lopez's competency to enter into a plea bargain agreement (I R.R. at 10).

The prosecutor objected to the speedy trial dismissal, maintaining that the State did not cause any delay and that a dismissal was not the proper remedy for a defendant with competency issues (I R.R. at 13, 16). The prosecutor directed the trial court's attention to chapter 46B of the Code of Criminal Procedure as the proper legal course for the court to take (I R.R. at 17).

Reasoning that a civil protective order had adequately remedied the conflict between Lopez and his mother, and after getting Lopez's personal assurance that he would not attempt to contact his mother, the trial court persisted in dismissing the information on speedy trial grounds (I R.R. at 12–16).

## SUMMARY OF THE ARGUMENT

The court of appeals erred by concluding that a 112 day delay was presumptively prejudicial. The court of appeals compounded this error by relying on potential future delay of competency hearings, even though the record does not support any implied findings of fact that Lopez was in fact incompetent or, assuming incompetency, that he would spend a significant amount of time having his competency restored. This appears to be the shortest delay in Texas case law combined with the novel idea that delay that has not yet occurred can factor into a *Barker* analysis. Furthermore, there was no evidence in the record that the State delayed the proceedings because it announced "ready" at the first and only trial setting. Nor does the record contain a genuine assertion of his right to a speedy trial—that is, a request for a trial rather than a dismissal. Nevertheless, the court of appeals weighed all three factors against the State and affirmed the trial court's order dismissing the case. Because the delay was short, and because Lopez never requested a trial, the court of appeals should have weighed these three factors against Lopez, or, in the very least, not against the State. The lower court erred to hold otherwise and, in doing so, issued a published opinion that strikes an awkward and unsteady balance between the defendant's right to a speedy trial and the public's right to the orderly administration of justice.

## ARGUMENT

**Ground One:** The court of appeals erred by concluding that a 112 day delay was presumptively prejudicial based on potential delay that had not yet occurred and by weighing the first Barker factor against the State.

The court of appeals concluded that the delay in this case was presumptively prejudicial because 112 days had elapsed since Lopez's arrest on felony charges and because "the trial court, as fact finder, was entitled to infer there necessarily would be additional delays before the case could proceed to trial on Lopez's guilt." *Lopez*, 563 S.W.3d at 420–21. The court of appeals erred in its conclusion that the length of delay was presumptively prejudicial, and it further erred to weigh this factor against the state.

Regarding the length of delay as a triggering factor, this is an uncommonly short period of time to trigger review of the remaining *Barker* factors. "The length of delay is a double inquiry: A court must consider whether the delay is sufficiently long to even trigger a further analysis under the *Barker* factors, and if it is, then the court must consider to what extent it stretches beyond this triggering length." *Hopper v. State*, 520 S.W.3d 915, 924 (Tex. Crim. App. 2017) (citing *Barker v. Wingo*, 407 U.S. 514, 530–32 (1972)).

In *Zamorano v. State*, 84 S.W.3d 643 (Tex. Crim. App. 2002), this Court reviewed a speedy trial claim in a misdemeanor DWI case. This Court suggested

in a footnote that a delay of eight months would be presumptively prejudicial to trigger a *Barker* analysis. *Id.* at 649 n.26 (citing *Harris v. State*, 827 S.W.2d 949, 956 (Tex. Crim. App. 1992)). This suggestion is in line with other jurisdictions. *See State v. Cassidy*, 578 P.2d 735, 738 (Mont. 1978) (delay of eight months triggered remaining factors); *State v. Iniquez*, 217 P.3d 768, 777 (Wash. 2009) (eight month delay in robbery case was presumptively prejudicial, and despite consistent assertions of his right and continuances granted to the state, there was no violation). However, courts often state in general terms that a delay approaching one year is presumptively prejudicial. *See People v. Echols*, 112 N.E.3d 1007, 1013 (Ill. App. 2018) (approximate 10 month delay was sufficient to trigger barker, but suggesting that it is only barely sufficient); *Glover v. State*, 792 A.2d 1160, 1167–68 (Md. 2002) (generally in Maryland, a delay of about a year triggers *Barker*); *State v. Borhegyi*, 588 N.W.2d 89, 92 (Wis. App. 1998) (noting that precedent generally indicates that a delay approaching one year is presumptively prejudicial (citing *Doggett v. United States*, 505 U.S. 647, 652 n.1 (1992); *Green v. State*, 250 N.W.2d 233 (Wis. 1990)). At least one state has indicated that six months can trigger review in a misdemeanor case. *See State v. Sui Ung Lau*, 890 P.2d 291, 299–300 (Haw. 1995) (deeming 6 months sufficient to trigger Barker for a DUI case, but noting the previous case was 7 months). And in this case, the court of appeals relied on *State v. Reaves*, 376 So.2d 136 (La. 1979), a

misdemeanor case where a three-and-a-half month delay was sufficient to trigger a *Barker* review. *Lopez*, 563 S.W.3d at 420–21 (*Reaves*, 376 So.2d at 138–39).

In all of the above cited cases, courts have generally determined the length of delay in a manner consistent with *Barker's* ad hoc approach—that is, the length of delay necessary to trigger review will vary with the facts of each case. *See Barker*, 407 U.S. at 531. However, it should be noted that at least a few courts will refuse to engage in a *Barker* analysis as a matter of law unless a specific amount of time has lapsed. *See State v. Ariegwe*, 167 P.3d 815, 831 (Mont. 2007) ("A speedy trial claim lacks merit as a matter of law if the interval between accusation and trial is less than 200 days (again, irrespective of fault for the delay)."); *State v. Maddox*, 195 P.3d 1254, 1260 (N.M. 2008) ("[A] minimum of nine months delay is necessary to trigger further inquiry into the claim of a violation of the right to speedy trial in simple cases, twelve months in cases of intermediate complexity, and fifteen months in complex cases." (citing *State v. Coffin*, 991 P.2d 477 (N.M. 1999))).

Without any precedent in Texas, and with a delay of 112 days, the court of appeals could rely only on *Reaves* to justify its decision to trigger the remaining *Barker* factors. However, under an ad hoc approach, *Reaves* is factually distinguishable from the present case in at least two significant ways. *Lopez*, 563 S.W.3d at 420–21 (*Reaves*, 376 So.2d at 138–39).

First, in *Reaves*, the prosecution had requested multiple resets from the court. And on the last trial date, the prosecution's primary witness did not show up and could not be found (the opinion suggests this absence was the result of a police strike). *Reaves*, 376 So.2d at 138. The prosecution dismissed charges and later refilled the case. The opinion notes that Reaves "appeared at all stages of the proceedings." *Id.* at 137. Thus, the particular facts of *Reaves* show that the State made repeated, failed attempts to try the accused. Second, the prosecution was forced to dismiss and then refile the misdemeanor case against Reaves to avoid an automatic acquittal and causing him to face reinitiated charges. *Id.*

Lopez, on the other hand, had only one trial date and he both suggested he was incompetent and moved for a speedy trial at the same time (I R.R. at 6, 10). Unlike Reaves, Lopez reaped the benefit of a favorable speedy trial ruling without risking an actual trial.

The undersigned counsel is aware of only one Texas case where the length of delay was comparable to the delay in this case. *State v. Wester*, No. 08-16-00105-CR, 2017 Tex. App. LEXIS 9070, 2017 WL 4277584 (Tex. App.—El Paso Sep. 27, 2017, no pet.) (mem. op., not designated for publication). Notably, in *Wester*, the El Paso Court of Appeals declined to review the *Barker* factors beyond the length of delay because the four month long delay in that case (possession of a controlled substance) was too short to trigger further consideration. *Id.* at *5–8.

Furthermore, even the court of appeals seems to understand that 112 days is insufficient to trigger a *Barker* analysis in this case because it also concluded that the "trial court, as a fact finder, was entitled to infer there necessarily would be additional delays before the case could proceed to trial on Lopez's guilt." *Lopez*, 563 S.W.3d at 421. How much additional delay? That is not clear from the opinion. The record in this case only establishes that the attorneys were concered about Lopez's competency to stand trial. The record does not establish the extent of Lopez's condition or, assuming he is found incompetent, how long it would take to restore him to so that he could be tried. (Lopez denied incompetency.)

On this point, the court of appeals reasoning should give this Court considerable pause. The State can't try Lopez because he might not be competent. But the State can't have him referred for an evaluation because it didn't try him quickly enough.

Because there is no evidence to show whether, or for how long, Lopez is, or might remain, incompetent, the length of delay should be assessed strictly from the arrest to the day of trial. Accordingly, the overwhelming precedent and the particular facts of this case support the conclusion that the court of appeals should not have reviewed the remaining *Barker* factors.

Yet, the court of appeals did review the remaining factors and weighed the first factor against the state. The court of appeals arrived at this conclusion based

on "the 112-day length of Lopez's pretrial incarceration, the simplicity of the offense, the maximum sentence for the charged offense, a reasonable time for the State to prepare this case, and [the] additional delay [that] would be necessitated by the unresolved question of Lopez's competency to stand trial." *Lopez*, 563 S.W.3d at 422 (alterations added). However, none of these considerations indicate "to what extent [the delay] stretches beyond this triggering length." *Hopper*, 520 S.W.3d at 924 (alteration added).

The court of appeals erred to have weighed this factor against the State without stating what the minimum length was. Of course, given the unclear nature of the future delay, as well as the miniscule delay that had already occurred, it would be difficult to assess such a minimum length. Thus, this factor should not have counted against the State.

**Ground Two:** The court of appeals erred by concluding that the State was responsible for the delay and by weighing the second Barker factor against the State.

The court of appeals found two reasons for delay in this case. First, the court of appeals concluded that the trial court was "entitled to infer the State should have filed a misdemeanor charge from the outset either because the misdemeanor charge was more appropriate or because the State had no evidence to prosecute the case as a felony." *Lopez*, 563 S.W.3d at 423. The second delay was

due to the "future delay" as a result of Lopez's alleged incompetency. *Id.* at 424. The court of appeals only faulted the State with the former.

Nevertheless, the court of appeals' logic is troubling. According to the court of appeals, when a prosecutor reduces a charge from a felony to a misdemeanor, there is an implication that "the State was at least negligent by initially filing the case as a felony when the case should or must have been filed as a misdemeanor form the outset." *Id.* at 423. This conclusion is troubling for two reasons: First, it is unsupported by the record, and, second, it could encourage bad charging policy from the State.

The only portion of the record to support this contention is the unsworn statements by Lopez's trial counsel.[1] Specifically, the statements that there was no

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[1] On rehearing the court of appeals misconstrued the State's argument. The court of appeals interpreted the State's argument on rehearing as contradicting the prosecutor's explanation for the charging decision. *Lopez*, 563 S.W.3d at 423. The State's argument was never intended to contradict the prosecutor's explanation of the State's charging decision (that the case was reduced to a misdemeanor despite evidence of bodily injury because it was "more appropriate"). The State's position on rehearing and on discretionary review is that the trial court could not rely on *defense counsel's* unsworn assertion that there was no evidence of bodily injury. Due to the short delay in this case, whether the trial court credited the prosecutor's explanation or not should have a marginal effect, if any at all.

The court of appeals also suggested in a footnote that "the record supports a possible third delay." *Lopez*, 563 S.W.3d at 422 n.1. The court of appeals reasoned that the trial court took judicial notice of Lopez's mother's position about the case. The court of appeals further faulted the State for failing to object to the trial court taking judicial notice of the mother's intent, whatever her intent was. *Id.* Of course a trial court is always owed deference when making express or implied findings of fact. *Gonzales*, 435 S.W.3d at 808–09. However, a court of appeals should not be able to use error forfeiture in combination with judicial notice to save a trial court's unsupported findings of fact.

evidence that Lopez caused bodily injury (II R.R. at 10, 11). Those statements are not competent evidence and neither a trial court nor a court of appeals should be permitted to infer or imply any facts from such statements. *See Gonzales v. State*, 435 S.W.3d 801, 811 (Tex. Crim. App. 2014) (attorney's statements absent personal knowledge are not evidence); *State v. Guerrero*, 400 S.W.3d 576, 585 (Tex. Crim. App. 2013) (trial counsel's statements may only be considered if based on first-hand knowledge); *Newman v. State*, 331 S.W.3d 447, 449 (Tex. Crim. App. 2011) (court of appeals may not consider unsworn factual assertions in speedy trial motion).

Thus, the record shows that Lopez was arrested for the felony offense of injury to an elderly person on April 18, 2017 (Defendant's Ex. 1), charged by information with misdemeanor assault on July 11, 2017 and set for a jury trial on August 8, 2017, at which time the State announced ready (II R.R. at 7). At this point, neither party had caused any meaningful delay. And the court of appeals should not be able to infer any other finding from the trial court given the state of the record.

Furthermore, this published opinion sends the wrong message to trial prosecutors. The opinion subtly, though not intentionally, discourages prosecutors from making an objective and thoughtful charging decision. It also discourages a prosecutor form filing a lesser charge because it may be "more appropriate." The

message from this opinion is that your act of discretion may be used against you, even if it's made in the defendant's favor. Accordingly, the State should not have been penalized for the short delay that did occur in this case.

**Ground Three:** The court of appeals erred by weighing the third Barker factor against the State without any evidence that Lopez asserted his right to a speedy trial.

The "failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial." *Barker*, 407 U.S. at 532. The burden to satisfy this portion of the *Barker* test generally falls on the defendant. *Cantu v. State*, 253 S.W.3d 273, 280 (Tex. Crim. App. 2008). Lopez first asserted his speedy trial right in a motion to dismiss. Nevertheless, the court of appeals concluded that the record in this case supported "an implied finding of historical fact that trial counsel legitimately felt the delay had caused so much prejudice that dismissal is warranted, even though the State announced ready to proceed to trial." *Lopez*, 563 S.W.3d at 425.

The court of appeals conclusion stands in sharp contrast to the general rule—that requesting a dismissal will generally weaken a speedy trial claim. *Cantu*, 253 S.W.3d at 283. This Court has acknowledged certain circumstances where a defendant can prevail on a speedy trial claim, even though they did not actually demand a speedy trial. These circumstances include a defendant who did

not know he was charged by indictment for over six years, *Gonzales*, 435 S.W.3d at 811–12, a defendant who had repeatedly appeared for trial despite the trial court's and the State's repeated failure to commence a trial, *Zamorano*, 84 S.W.3d at 651–52, and a defendant who was prejudiced by the death of a witness and who did not know about an indictment for over a year, *Phillips v. State*, 650 S.W.2d 396, 400–401 (Tex. Crim. App. 1983). These examples are a part of what should be a very short list of possible excuses for not invoking the speedy trial right by requesting an actual trial. And this Court should not allow the court of appeals to add Lopez's failure to this list.

The State does acknowledge that a different record might create a different o0utcome (as is always the case). For instance, had Lopez submitted to a competency examination, and had a professional provided a reliable opinion to the trial court that Lopez was incompetent and would most certainly remain so for the foreseeable future, then perhaps there would be a record to support a the conclusion that Lopez could assert his rights in the form of a dismissal. *See Jackson v. Indiana*, 406 U.S. 715, 739–40 (1972) (suggesting that a defendant who cannot have competency restored may have a right to a speedy trial or due process dismissal, but declining to decide that because the state courts did not pass upon that question); *see also U.S. ex rel. Little v. Twomey*, 477 F.2d 767, 738 (7th Cir. 1973) ("A different matter, and one not argued here, would be involved if Little

had been held 'more than the reasonable period of time necessary to determine whether' there was a substantial probability that he would attain capacity in the foreseeable future." (citing and quoting *Jackson*, 406 U.S. at 738). However, Lopez avoided the possibility of such an outcome by seeking a dismissal on the first trial setting.

The instant record contains no demand for a speedy trial; it contains a request for a dismissal given on the day of trial without prior notice. The court of appeals reliance on an implied finding based how trial counsel may have "legitimately felt" cannot be reconciled with this Court's requirement of that a "cogent reason" be given for the failure to demand an actual speedy trial. *Lopez*, 563 S.W.3d at 425; *Cantu*, 253 S.W.3d at 283. Rather than weighing this failure against the State, the court of appeals should have weighed it decisively against Lopez.

**Conclusion**

The State did not challenge in the court of appeals, and does not here, that Lopez endured some prejudice from his time spend in jail. However, this prejudice—during 112 days—did not have time to compound to a magnitude that would allow the *Barker* factors to, as a whole, weigh in favor of Lopez. Such a brief amount of prejudice cannot offset Lopez's failure to request a trial during the

short period of time his case was pending. This State asks this Court to so balance the *Barker* factors in favor of the State and remand this case to the trial court so that Lopez may be tried or, if appropriate, evaluated for competency to stand trial.

## PRAYER FOR RELIEF

WHEREFORE PREMISES CONSIDERED, the Petitioner State respectfully requests that this Court sustain the State's grounds for review and remand this case to the trial court for further proceedings.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I, Nathan E. Morey, assistant district attorney for Bexar County, Texas, certify that a copy of the foregoing petition has been delivered by email to Michael D. Goains and the Office of the State Prosecuting Attorney on April 25, 2019 in accordance with Rules 6.3(a), 9.5(b), and 68.11 of the Texas Rules of Appellate Procedure.

## CERTIFICATE OF COMPLIANCE

I, Nathan E. Morey, certify that, pursuant to Texas Rules of Appellate Procedure 9.4(i)(2)(D) and 9.4(i)(3), the above response contains 5,002 words according to the "word count" feature of Microsoft Office.

/s/ *Nathan E. Morey*

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